No. 153.

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SUPREME COURT

Filed Oct. 4, 1898.

OF THE UNITED STATES.

OCTOBER TERM, 1898.

JOHN K. MULLEN AND CHARLES D. McPHEE,
Plaintiffs in Error,

vs.

THE WESTERN UNION BEEF COMPANY,
Defendant in Error.

No. 153.

STATEMENT AND BRIEF OF DEFENDANT IN ERROR.

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This is a writ of error to the Court of Appeals of the State of Colorado. The defendant in error has filed a motion to dismiss the writ, upon the ground of want of jurisdiction. The plaintiffs in error have filed a brief in which some of the points that are

involved in our motion to dismiss are also argued. We think it would be better, however, to state our position and submit our authorities upon the motion to dismiss the writ of error separate from our argument of the main question.

Motion to Dismiss Writ of Error.

The motion to dismiss is based upon two grounds: (1) There has been no decision of this case by the highest court of Colorado having jurisdiction of the same; (2) whatever federal question there may be in the case has been decided in favor of the plaintiffs in error. We will discuss each of these questions separately:

First: There has been no decision of this case by the highest court of Colorado having jurisdiction of the same.

The first clause of section 25 of the Judiciary Act compels parties to exhaust every remedy in the State courts before attempting an appeal to this highest of federal tribunals. In the case at bar this provision of the statute has not been complied with. This is a damage suit which was begun in the District court of Arapahoe county, Colorado, by J. K. Mullen and Charles D. McPhee against The Western Union Beef Company. A trial was had in that court resulting in a verdict for the defendant. The plaintiffs sued out a writ of error to the Court of Appeals of the State of Colorado, where the judgment of the lower court was affirmed. The present writ of error was then sued out to this judgment of the Court of Appeals. Our contention is that the plaintiffs in error should have taken the case to the Supreme Court of Colorado and had a decision, before any authority is given to come direct to this court.

The Supreme Court of Colorado is the highest tribunal of that State. Until 1891 it was the only

appellate tribunal of any kind. The legislature of that year created the Court of Appeals to relieve the congestion of business in the Supreme Court. The new tribunal was given appellate jurisdiction in the first instance of all final judgments of district courts. In certain cases the Supreme Court retained jurisdiction, by writ of error, either direct to the district courts or to the Court of Appeals. But the Supreme Court was given final jurisdiction of all cases involving a construction of the State or Federal Constitution. Sections 1 and 4 of the act are printed in the brief of counsel for plaintiffs in error, at page 3. We quote from section 4, which defines the jurisdiction of the Court of Appeals:

> "It shall have jurisdiction, *not final*, in cases where the controversy involves a franchise or freehold, or where the construction of a provision of the Constitution of the State or of the United States is necessary to the decision of the case."

And the last section of the act confers jurisdiction upon the Supreme Court of these excepted cases. But a quotation from the first important case construing this act by the Supreme Court of Colorado will suffice on this point. The court said:

> "It is suggested by counsel that this court is without authority to review the judgment of the district court in this proceeding. It is conceded that if this court has jurisdiction since the enactment of the statute creating the Court of Appeals, it is by virtue of the proviso in the first section of the act creating that court, by which the jurisdiction of this court is retained where the construction of a provision of the constitution of the State or of the United States is necessary to the determination of a case.
>
> "The object of providing for the jurisdiction of this court in all cases where

constitutional questions are involved is that questions of such grave importance, affecting the organic law of the State and the power of the legislative, executive and judicial departments, should be determined by the highest court in the State. In several States intermediate courts of review have been created, but the provisions fixing the jurisdiction of such courts are far from uniform. The section in force in this State does not appear to have been copied, even in substance, from the laws of any other State. It has the merit of being couched in as direct and positive language as could well have been employed.

"Under the proviso, whenever a constitutional question is necessarily to be determined in the adjudication of a case, an appeal or writ of error will lie from the final judgment to this court. It matters but little how such question is raised, whether by the pleadings, by objections to evidence, or by argument of counsel, provided the question is by some means fairly brought into the record by a party entitled to raise it. It is obvious, however, that some limitation must be placed upon the foregoing proviso, otherwise every case might be brought into this court, and thereby the power and usefulness of the Court of Appeals destroyed. It is clear that mere assertion that a constitutional question is involved will not be sufficient to give jurisdiction. It must fairly appear from an examination of the record that the decision of such question is necessary, and also that the question raised is fairly debatable. Our attention has been called to a number of cases in which this question has been raised under statutes, which although dissimilar from the one in force in this State, the decisions are valuable as authorities in support of the conclusion that the constitutional question involved

to give the court jurisdiction must be fairly debatable, and not based on mere assertion. To this extent, at least, the authorities are uniform. See Elliott's Appellate Procedure, sec. 33; The City of Cairo vs. Bross, 99 Ills. 521; Chaplin vs. Commissioner of Highways, 126 Ills. 264; Benson, Administrator, vs. Christian, 129 Ind. 535; Williams vs. Louisiana, 103 U. S. 637.

"The statute creating the Court of Appeals has been is force in this State but a short time, and it is obvious that the practice under it can only be developed and become settled as the result of experience and judicial decision from time to time as questions shall be presented. We shall not undertake to determine in this case, nor is it necessary to determine, whether or not constitutional questions which have once been determined by this court can thereafter be considered open to controversy to the extent of furnishing ground for jurisdiction in subsequent cases in this court.

"Under the foregoing provision, whenever the construction of a constitutional provision, State or National, is necessary to a determination of a case, the court has entire jurisdiction of the case, not only of the constitutional question, but of all other matters necessary to a complete determination of the controversy. The same result would necessarily follow from the well established rule that the incidents of a class of cases follow the class. This rule is now universally recognized. Any other would distribute the cases by piecemeal between the two courts of review, involving our litigation in hopeless and inextricable confusion. Elliott's Appellate Procedure, sec. 36; Smith vs. Newberne, 70 N. C. 14; Cook County vs. McCrea, 93 Ills. 236."

Trimble vs. People, 19 Colo. 187.

Counsel for plaintiffs in error concede this much, but insist that no constitutional question is involved in this case. An examination of the record, however, will show that the defendant insisted from the very beginning that the act of Congress relied upon by the plaintiffs was unconstitutional if it authorized the regulations issued by the Secretary of Agriculture. When the plaintiffs opened their case to the jury, the very first offer of evidence made was of a certified copy of certain Rules and Regulations of the Department of Agriculture, which it was claimed the defendant had violated. These were objected to by the defendant upon two grounds: (1) That the said rules and regulations had never been authorized by any act of Congress; and (2) any act of Congress authorizing the same would be unconstitutional and void. This objection was overruled, and the defendant noted an exception. The regulations (Transcript of Record, page 50 (folio 55)), were then introduced in evidence and a large amount of testimony concerning other points given, and the plaintiffs then called Mr. Jordan, a special agent of the department of agriculture. When he was asked concerning the quarantine rules and regulations and any violation of the same, counsel for defendant again objected for the reason that Congress had no authority to authorize such rules and regulations, and that the act of Congress itself did not, as a matter of fact, authorize these particular ones. Considerable discussion was had at that time, and the objection was again overruled and an exception saved.

Transcript of Record, page 141.

The same objection was renewed all the way through the plaintiffs' testimony, always overruled and exceptions saved. At the close of plaintiffs' case, a motion for nonsuit was made by the defendant upon several grounds, the fifth of which was:

"The act of Congress under which the regulations of the National Board of Health were made is unconstitutional and void, because it is not authorized by any provision of the Federal Constitution."

Transcript of Record, page 190.

This motion was denied and an exception saved. At the end of all the evidence the defendant asked for a number of instructions, of which number ten was as follows:

"The court instructs the jury that the act of Congress and the rules and regulations made under the same which the plaintiffs allege to have been violated, are not authorized by the Constitution of the United States, and are not valid subsisting laws or rules and regulations with which the defendant is bound to comply, and any violation of the same would not, of itself, be an act of negligence, and you are not to consider a violation of the same as an act of negligence in itself in arriving at a verdict in this case."

Transcript of Record, page 253.

This instruction was refused, and the defendants saved an exception.

Thus it will be seen that from the very start to the close of the case the defendant insisted upon the fact that the rules and regulations which were being introduced in evidence were not authorized by any provision of the Constitution of the United States. The same point was argued in the Court of Appeals and partially passed upon by that tribunal.

Thus Judge Thomson in his opinion says:

"The second provision undertakes to regulate the duties in relation to them of the persons by whom they might be removed

after their arrival in the State, and it is upon this provision that the plaintiffs' reliance is chiefly placed. After becoming domiciled within the State their management would be regulated by its laws, and not by the act of Congress. Any violation of the federal law in connection with the cattle would consist in their removal. The disposition of them afterwards was not within the scope of the statute."

Transcript of Record, page 8.

Even counsel for the plaintiffs in error in their petition for rehearing urged that one of the errors committed by the Court of Appeals was in construing the regulations of the Secretary of Agriculture as unwarranted by any act of Congress. And in their petition for a writ of error from the Court of Appeals to this court the same complaint is made. Thus, the eighth specification of errors set out in their petition is as follows:

"This court erred in holding and deciding that the rules and regulations promulgated by the secretary of agriculture on April 23, 1891, as shown by the record herein, were not applicable to the herd of cattle which the defendant in error imported into Colorado in June, 1891, as shown by the record herein, for the reason, as this court held, that after said cattle were domiciled in Colorado their management must be regulated by the State laws, and not by the act of Congress, and that the disposition of said cattle afterwards were not within the scope of Federal authority."

Transcript of the Record, page 14.

Finally, the assignment of errors filed in this court, and upon which this argument is being had, renews this claim and repeats this identical language.

See the eighth assignment at page 18 of the Record. The record, therefore, shows that counsel for the defendant contended from the very beginning that certain proceedings adopted by the Secretary of Agriculture were contrary to any authority conferred upon the federal officers by the Constitution of the United States. Counsel for the plaintiffs contended that this power was granted by the Constitution of the United States, and insists that the Court of Appeals of Colorado decided this question against them. Not until preparing a brief for this court has any other thought ever passed through his mind. But now—too late—it is seen that it is absolutely essential to the case of plaintiffs in error that no constitutional question should be involved. The record is conclusive on this point.

As a matter of fact, any federal question necessary to maintain a writ of error from this court to a State court must necessarily involve a constitutional question. Any authority granted to this tribunal to take a case from the State courts must arise under the Constitution of the United States. Any law passed by an act of Congress must find its authority in the Constitution of the United States. Any case arising under the laws of the United States must arise under the Constitution, and any right claimed under a law of the United States is a right claimed under the Constitution of the United States. In the case at bar, however, the constitutional question was distinctly raised and insisted upon at all times.

The Supreme court of Colorado has said that whenever a constitutional question is involved in a case it can be brought to that tribunal for review. If the question is trivial, and evidently raised for the sole purpose of conferring jurisdiction upon that court, it would probably refuse to consider the case.

Trimble vs. People, 19 Colorado, 187.
Mackey vs. Tabor, 22 Colorado, 67.
Spangler vs. Greene, 21 Colorado, 505.
Hurd vs. Atkins, 21 Colorado, 259.

But who is to judge whether or not a constitutional question clearly existing in the record is raised for the sole purpose of conferring jurisdiction upon the Supreme Court? It was raised at the very beginning of the case, was never abandoned, and has been argued by both sides until this moment. Under the repeated decisions of this court, the Supreme Court of Colorado was the first tribunal to pass upon this question, and counsel for plaintiffs in error should have gone there before coming to this court. It is well settled that parties must make a *bona fide* attempt to have their case reviewed by every State tribunal that could possibly have jurisdiction before coming to this court.

McComb vs. Knox County, 91 U. S. 1.
Fisher vs. Perkins, 122 U. S. 522.
Great Western Tel. Co. vs. Burnham, 162 U. S. 339.
Bacon vs. Texas, 163 U. S. 207.
Levy vs. Superior Court, 167 U. S. 175.

The question raised was vital. No court can pass upon the whole case without considering it. The defendant below having won its case, an appellate court could of course affirm the judgment without necessarily deciding the ~~case.~~ issue. But no judgment of reversal could be entered without first passing upon the question, and no intelligent opinion can be written on the entire case without giving it some attention. The question is therefore involved and necessary to a decision of the case. Not having

been passed upon by the Supreme Court of Colorado, the present case has no business in this court.

Second: Whatever Federal question there may be in the case has been decided in favor of the plaintiffs in error.

To maintain the jurisdiction of this court, it is necessary that the Federal question raised should be decided against the right claimed. Counsel has devoted the second head of his brief to a discussion of this question, resting his position solely on the opinion of the Court of Appeals. While wholly satisfied that this opinion is in itself entirely correct, we insist that the entire record shows beyond controversy that all rights claimed by plaintiffs under Federal authority were fully conceded to them. It is well settled that the opinion of an appellate court will not control the actual facts of a cause, but a still higher court will look at the entire record to see what rights were actually at issue and how they were finally determined.

Lake Shore R. R. vs. Hessior, 150 Ills. 546.

Marshall Nat'l Bank vs. Conniff, 151 Ills. 329.

Wheatland vs. Pryor, 133 New York, 97.

The reasoning even of an appellate tribunal is not ground for error, but the result accomplished by its decision, and to get at this result the entire record must be consulted.

Christy vs. Stafford, 123 Ills. 463.

Pennsylvania Co. vs. Keane, 143 Ills. 172.

The record shows that this suit was brought to recover damages for negligence alleged against the defendant. One of the grounds of negligence was

failure to comply with certain rules and regulations promulgated by the Secretary of Agrienlture of the United States. The answer denied negligence, and also asserted a full compliance with all proper rules and regulations. On the trial the plaintiffs were permitted over the objections of the defendant to introduce the rules and regulations in evidence, and to show by all the testimony possible that they were not complied with. They were thus permitted to show that the United States authorities had made rules and that the defendant had failed to comply with them. So far no complaint can possibly be made.

The defendant, in its testimony, attempted to show that the rules and regulations introduced in evidence by the plaintiffs had been changed by the Secretary of Agriculture. This evidence was addressed to the court and not to the jury. The court was not convinced, and to prevent any misunderstanding the jury was informed explicitly that Secretary Rusk had not modified the particular paragraph of the regulations in controversy. Transcript of Record, page 257, folio 464.

The instruction on this point being as follows:

> "It is claimed on the part of the plaintiffs that the defendant violated this provision of this notice. It is claimed on the part of the defendant that prior to the shipment of the cattle the Secretary of Agriculture had modified this rule. I think the evidence, and I so charge you, fails to show that the Secretary of Agriculture had in a legal manner rescinded or abrogated the rule, so that this rule remained and was in force at the time that these cattle were landed at Iliff, in this State."

So that, so far as the integrity of the regulations themselves was concerned, the plaintiffs had the full benefit of their enactment, of their introduction in

evidence, and of their violation, if they proved any. At the close of the evidence every point had been decided in their favor. When it came to instructions requested, given and refused, the situation, as shown by the record, was as follows:

The defendant requested the court to give a large number of instructions, among which were two framed to meet this issue; one, numbered 9, was, in substance, that the defendant had complied with all the rules and regulations made under the act of Congress; the other, numbered 10, was that Congress had no authority to pass the act authorizing the regulations. Both were refused and the defendant excepted.

The plaintiffs asked for instructions upon but four points, all told: first, that a failure to comply with paragraph 2 of the Rules and Regulations of the Department of Agriculture was negligence *per se;* second, a definition of reasonable care; third, that Secretary Rusk did not do away with or modify paragraph 2 of the Rules and Regulations; and fourth, upon the question of *scienter*. The last three were all given by the court. The first was given in modified form; that is, the court refused to instruct that a violation of the Rules and Regulations was negligence *per se*, but did say that the Rules and Regulations were sufficient to put the defendant upon inquiry, and were notice to it that the government of the United States was of the opinion that it was unsafe to ship cattle in violation of their terms. (Transcript of Record, pp. 257, 258.)

We contended that the court went beyond any rule of law in giving this instruction, but however that may be, the plaintiffs were satisfied with it, saved no exception, and permitted the case to go to the jury and be decided upon the record so made up.

On this point the Court of Appeals says:

> "We are not at liberty to review the instructions because no proper objection was made to them when they were given."

The rule invoked that a mere general exception to a general charge saves nothing has received the repeated sanction of the Supreme Court of Colorado and of this court.

> Edwards vs. Smith, 16 Colorado, 529.
>
> D. & R. G. R. R. Co. vs. Ryan, 17 Colorado, 98.
>
> Block vs. Darling, 140 U. S. 234.

The right claimed under the Federal statute is thus decided in favor of the plaintiffs. The court permitted them to prove their regulations, that the defendant violated them, and instructed the jury that this is an element of negligence. No right has been denied. It is true that the full claim of plaintiffs that violation of the regulations is negligence *per se* has not been conceded, but this modification of the court is consented to by the plaintiffs. No exceptions were saved to the instructions given. They accept thereby the view of the court and make its position their position. The only right claimed by them under the Federal statutes is that stated in the court's instructions, and this is decided in their favor.

The only possible Federal question that can exist in the case is the modification by the court of the first request made by counsel for the plaintiffs. This request was that the court should instruct absolutely that a violation of these rules and regulations was negligence *per se*. The court instructed that such a violation would simply be evidence of negligence, to be considered by the jury together with all other evi-

dence in the case. Under the decisions of this court and of all courts, unless an exception is saved to a modification of an instruction requested, the party waives any exception which he might take to the request itself.

We may illustrate our point in this way. At the conclusion of the evidence counsel for plaintiffs says to the court, "We ask your Honor to instruct upon these points as follows."

The court replies, "I do not believe that under the law and the evidence I would be justified in giving such instructions, but I will modify them to this extent and so instruct."

Counsel then listens to the instructions given and says, "Very well, we are satisfied with the instructions given by your Honor."

Is not this a complete waiver of any claim that the court erred in refusing the previous request? It has been practically so held by this court and the Court of Appeals of New York.

Beaver vs. Taylor, 93 U. S. 46.
Ayrault vs. Pacific Bank, 47 N. Y. 570.
Walsh vs. Kelly, 50 N. Y. 556.
Requa vs. City of Rochester, 45 N. Y. 129.

It follows that the only possible Federal question in the case was decided as the plaintiffs wished it to be decided. No right, privilege or immunity claimed by them was denied. This court, therefore, has no jurisdiction to review the judgment of the Colorado Court of Appeals.

Ryan vs. Thomas, 4 Wallace, 603.
Carpenter vs. Williams, 9 Wallace, 785.
Missouri vs. Andriano, 138 U. S. 496.

Argument Upon Main Case.

The question for discussion under this head is whether or not the action of the Court of Appeals in affirming the judgment of the lower court is correct. Counsel for plaintiffs in error base their entire argument upon the language of the Court of Appeals in deciding the case. We desire to base our entire argument upon the record as a whole. We are entirely satisfied with the opinion itself, and believe that this court will say, if it becomes necessary, that it states the law. But the decision could have rested upon several other grounds and reached the same result. As already seen, the complaint charges the defendant company with negligence in shipping certain cattle from Kimble county, Texas, to Logan county, Colorado. It is ambiguous and uncertain as to just what ground of negligence is alleged against the defendant, but seems to attempt to set forth two grounds: first, negligence generally, in knowingly shipping cattle that were liable to impart the Texas fever; and, second, in shipping cattle in violation of the quarantine regulations of the State of Colorado as lawfully established for the year 1891, and in violation of the regulations of the United States Department of Agriculture, lawfully established under and by virtue of the acts of Congress for that purpose passed. The defendant is then charged with permitting these cattle to run at large upon the public range so that they came in contact with cattle of the plaintiffs, giving them Texas fever, from which a large number died, and the plaintiffs were damaged.

Transcript of the Record, pages 23 to 27.

A demurrer to the complaint was overruled, and the defendant company answered denying any negligence on its part and averring a full compliance with all lawful sanitary rules and regulations. By an

amendment to the complaint filed shortly before the trial, the negligence of the defendant in violating the rules and regulations of the Department of Agriculture was attempted to be set out more specifically.

Transcript of the Record, page 35.

But the court will see that while most of the evidence that was introduced was upon the theory that the defendant was mainly guilty of negligence in violating the quarantine rules and regulations, that the case was also tried upon the theory of negligence generally in the defendant permitting its diseased cattle to come in contact with healthy cattle of the plaintiffs.

The case was tried in September, 1894. At the opening of the case the defendant objected to the introduction of any evidence, for the reason that the complaint did not state facts sufficient to constitute a cause of action under the common law rule of negligence, and did not aver specifically any breach of rules and regulations made by the State or national authorities. This objection was overruled, and the defendant then asked that the plaintiffs be compelled to elect upon which theory they would proceed, whether for the violation of the common law rules of negligence, or for violation of statutory provisions. This motion was denied. The plaintiffs then offered in evidence the rules and regulations of the Department of Agriculture, which were objected to by the defendant, upon the ground that they were not authorized by the act of Congress, and if authorized, the act itself was unconstitutional and void. The objection was overruled and the rules and regulations introduced in evidence. The case was then tried for eight successive days, and a large amount of evidence introduced on both sides. The plaintiffs were permitted to introduce testimony tending to show not only common law negligence, but to prove the

existence of the rules and regulations of the Department of Agriculture and claim a violation of the same. The defendant introduced a mass of testimony showing that it had not been guilty of any common law negligence, that it had fully complied with all the State quarantine regulations, and that Secretary Rusk had modified the rules and regulations introduced in evidence by the plaintiffs. At the close of all this testimony the jury was instructed upon the law, certain instructions asked by the plaintiffs and defendant were refused, the jury retired, and brought in a verdict for the defendant. The Court of Appeals decides that under the practice in Colorado no sufficient exceptions were saved to the instructions given, and that the plaintiffs have no ground upon which any error can be predicated so far as the instructions to the jury are concerned. So far as any exceptions to the introduction of evidence ~~is~~ are concerned, none appear by the printed transcript, and none are urged by the plaintiffs in error before this court. So that we have this extraordinary condition of affairs: the plaintiffs are permitted to introduce whatever evidence they see fit, have no fault to find with the rulings of the court on the evidence of the defendant, and save no exceptions to the instructions of the court to the jury.

We confess that we are unable to see what remaining error can be urged before this court. If all the evidence was properly admitted and the jury properly instructed upon the law, what error can possibly exist to justify a reversal? But counsel say that an intermediate appellate court, in an opinion passing upon this evidence and passing upon those instructions, announced certain propositions of law that are not correct. We might concede this to be true and, at the same time, insist that the judgment should be affirmed. If, as a matter of fact, the actual

judgment in the case was reached without error, then any mere language used by the Court of Appeals concerning the record would be wholly immaterial and no ground whatever for reversing the original judgment by reversing that of the Court of Appeals.

The only error that we understand is discussed or claimed by counsel for plaintiffs in error relates to a part of the instructions given by the court below, and which is set out on pages 5 and 6 of their brief. As no exception was saved to this instruction, no error can be predicated upon it. For this reason alone we think that the judgment of the court below must necessarily be affirmed by this court.

But in addition to all this, the opinion of the Court of Appeals clearly states the law. This opinion will be found in the record beginning on page 3 and ending on page 9. It construes the act of Congress of May 29, 1884, entitled "An Act for the Establishment of the Bureau of Animal Industry, etc." This act will be found in the 23 Statutes at Large, page 31. It consists of eleven sections. The first section creates the Bureau of Animal Industry, whose duty it is to investigate and report upon the condition of domestic animals in the United States. Section 2 provides for the appointment of agents by the commissioner of agriculture, whose duty it shall be to examine and report upon the best methods of treating, transporting and caring for animals infected with certain diseases. Section 3 provides as follows:

> "That it shall be the duty of the Commissioner of Agriculture to prepare such rules and regulations as he may deem necessary for the speedy and effectual suppression and extirpation of said diseases, and to certify such rules and regulations to the executive authority of each State and Terri-

tory, and invite said authorities to co-operate in the execution and enforcement of this act.

"Whenever the plans and methods of the Commissioner of Agriculture shall be accepted by any State or Territory in which pleuropneumonia or other contagious, infectious or communicable disease is declared to exist, or such State or Territory shall have adopted plans and methods for the suppression and extirpation of said diseases and such plans and methods shall be accepted by the Commissioner of Agriculture, and whenever the governor of a State, or other properly constituted authorities, signify their readiness to co-operate for the extinction of any contagious, infectious or communicable disease in conformity with the provisions of this act, the Commissioner of Agriculture is hereby authorized to expend so much of the money appropriated by this act as may be necessary in such investigations, and in such disinfection and quarantine measures as may be necessary to prevent the spread of the disease from one State or Territory into another."

Section 4 provides that the Commissioner of Agriculture shall make investigations as to certain diseases of animals. Section 5 provides that the Secretary of the Treasury shall adopt measures to prevent diseased animals from being exported abroad. Section 6 prohibits railroad companies from transporting diseased animals, and that no person shall transport such diseased animals from one State to another.

Section 7 is as follows:

"That it shall be the duty of the Commissioner of Agriculture to notify, in writing, the proper officials or agents of any railroad, steamboat, or other transportation company

during business in or through any infected locality, and by publication in such newspapers as he may select, of the existence of said contagion;

"And any person or persons operating any such railroad, or master or owner of any boat or vessel, or owner or custodian of or person having control over such cattle or other live stock within such infected district, who shall knowingly violate the provisions of section 6 of this act, shall be guilty of a misdemeanor, and upon conviction shall be punished by a fine of not less than one hundred nor more than five thousand dollars, or by imprisonment for not more than one year, or by both such fine and imprisonment."

Section 8 provides for the suppression of contagious diseases among cattle in the District of Columbia. Section 9 provides that the United States attorney shall prosecute all violations of the act. Section 10 contained an appropriation. Section 11 closes the act with a provision for an annual report.

Under this law and the supplementary statute passed in 1890, the Secretary of Agriculture, on the fifth day of February, 1891, promulgated certain rules and regulations for that year, which on the twenty-third day of April were amended, or rather added to, by certain additional provisions. The Court of Appeals of Colorado, in construing these rules and regulations of the Secretary, held that they had not been issued in compliance with the act of Congress. The rules and regulations purport to be issued in accordance with section 7. An examination of the section will show that no authority is given to make rules and regulations of any kind, nature or description, but simply to give notice to railroad companies and others engaged in interstate traffic. The only authority to make rules and regulations

will be found in section 3, and it is there provided that any made can only have force or effect after they are adopted and agreed to by State authorities. And so careful was Congress that it is only after the rules and regulations have been agreed to by State authorities, that the Commissioner of Agriculture is authorized to take any measures whatever to prevent the spread of the disease from one State or Territory into another. Section 6 prohibits any person from driving diseased cattle from one State to another. As such, it undoubtedly comes within the power of the general government to regulate interstate commerce; and with section 5 it is probably the only portion of the act that is clearly within the authority of Congress. Neither 5 nor 6 has anything to do with the case at bar.

The rules and regulations expressly state that they are based on section 7 of the act. We do not know that we can add anything to the reasoning of the Court of Appeals upon these matters, and we ask this court carefully to consider the opinion of that court. We believe that it will agree fully with the exposition of the law there found. No attempt was made at the trial to show that these rules and regulations had ever been agreed to by the State authorities of either Colorado or Texas. No compliance was shown or attempted with any of the provisions of section 3 of the act in question as to securing the concurrence of the State authorities. The rules and regulations themselves state that they are conditioned upon the consent of certain State authorities, and no attempt was made to show that those State authorities had ever agreed to these conditions. So far as sections 3 and 7 are concerned, the one never authorized any rules and the other was never complied with.

We find some difficulty in following the argument of counsel on this branch of the case. It is claimed that section 3 authorized the rules of April 23, but these rules require the consent of the State authorities, and no consent being shown, it is then contended that the rules of February 5 were left in full force and effect. But we submit that a party could not under any rule of law be charged with negligence for violating a regulation which the power making had afterwards done away with. No authorities are cited that in any way impeach the reasoning of the Court of Appeals or support the position urged by counsel.

There are two phases of the case upon which we wish to say a few words: First, whether or not the jury should have been instructed that the violation of these rules and regulations was negligence in itself, or simply evidence of negligence which should go to the jury in connection with all the other facts and circumstances of the case; and, second, whether the particular regulation which these defendants are charged with violating was authorized by the act of Congress, or whether any act of Congress authorizing such a regulation would be constitutional and valid. Upon the first of these points the record shows that counsel for the plaintiffs asked for a peremptory instruction to the effect that a violation of these regulations was negligence in itself, that this was refused, and the court instructed that the regulations themselves were simply notice to the defendant. That is to say, a violation of the regulations would simply be evidence of negligence. As no exception was saved to the instruction, no question upon this point is really in the case, but whether an exception was saved or not, the instruction was clearly right. This court has already decided, after

full argument, that the act creating the Bureau of Animal Industry was not intended to establish civil liabilities between private parties.

Missouri, Kansas & Texas Ry. Co. vs. Haber, 169 U. S. 613.

That case also sustains the construction of the Court of Appeals that the Commissioner of Agriculture had no authority to act without the co-operation of the States themselves.

Rules of this kind, with no penalty for their violation, cannot have the effect of statutes and subject parties to liability for their violation irrespective of the question of due care. No case can be found in the books to sustain the position of counsel for plaintiffs in error.

The vice of the instruction requested and the correctness of the rule of law laid down by the court is shown by the decisions of this court. In passing upon a municipal ordinance that created a duty, the court says:

> "In the analogous case of fences required by the statute as a protection for animals, an action is given to the owners for the loss caused by the breach of the duty. And although in the case of injury to persons by reason of the same default, *the failure to fence is not, as in the case of animals, conclusive of the liability, irrespective of negligence, yet an action will lie for the personal injury, and this breach of duty will be evidence of negligence.*"

Hayes vs. Michigan Central Rd., 111 U. S. 228.

Union Pacific Rd. Co. vs. McDonald, 152 U. S. 262.

See also—

Knupfle vs. Knickerbocker Ins. Co., 84 N. Y. 488.

Many questions suggest themselves and might be urged upon this branch of the case. We might enter upon a lengthy discussion of the maze of cases clustered about the doctrine of proximate cause, and show that a violation of these rules was not the cause of the injuries complained of, or we might challenge the ground that this statute was ever intended to cast any duty whatever upon individuals that does not exist at common law. But it is not necessary. The instruction asked for is not supported by any authority; the instruction given was not excepted to. No other matter is open to discussion.

Second: The particular regulation which is charged to have been violated was never authorized by the act of Congress itself, and if authorized would be unconstitutional and void. This case hinges upon clause 2 of the regulations of April 23, 1891. These regulations permitted cattle to be taken from certain districts in Texas to the States of Colorado, Wyoming and Montana, for grazing purposes. Said cattle were to go under certain conditions. The first and second of these were as follows:

(1) That cattle from said area shall go into said States only for slaughter or grazing, and shall on no account be shipped from said States into any other State or Territory of the United States before the first day of December, 1891.

(2) That such cattle shall not be allowed in pens or on trails or ranges that are to be occupied or crossed by cattle going to the eastern markets before December 1, 1891, and that these two classes shall not be allowed to come in contact.

It is this second provision which the defendant is charged with violating. It is claimed that it permitted cattle shipped from Texas to Colorado to come in contact with cattle going to the eastern markets before December 1, 1891. It will be noted that these regulations permit cattle to be shipped into Colorado for grazing purposes, *and attempt to provide how said cattle shall be grazed after arriving in Colorado.* No authority will be found in the act itself for any such provision as this, unless it be in the first three sections, and if given there, it is clearly beyond the scope of any grant of power contained in the Constitution of the United States to Congress. Congress had plenary authority to regulate commerce between the several States, but it has no authority whatever to regulate the industrial affairs or any products which are solely within the jurisdiction of the particular States. In other words, Congress may regulate the shipment of cattle from one State to another, but cannot regulate or provide what shall be done with cattle after the shipment is complete. It might as well be urged that Congress had the right to provide how cattle should be raised, how they should be fed, in what condition they should be kept, how they should be slaughtered, for what price the beef should be sold, and how it should be cooked before eating. If no power exists to do this, neither does it exist to say to a person, you may ship your cattle from Texas to Colorado, but after they have arrived in Colorado you must graze and feed them in a particular way. If Congress can say that cattle shall be cared for in a certain way from April to December of any year, it has the right to say they shall be cared for in a certain way for an indefinite period. Congress itself, in passing this act, seems to have realized the limitations placed upon its power by the Constitution, and all the way

through we find that everything to be done must be with the consent of the State authorities.

This court has stated principles in a number of cases that are conclusive of this proposition. It is not necessary to go into them at length. The line between Federal authority over the productions and manufacturing industries of the State, and interstate commerce, was clearly and distinctly drawn in what is commonly known as the Sugar Trust case, and reported under the title of The United States vs. Knight, 156 U. S. 1. The principles announced in other cases are equally conclusive.

Kidd vs. Pearson, 128 U. S. 1.
Leisy vs. Hardin, 135 U. S. 100.

We might also call the attention of the court to the fact that such eminent authority as Judge Thompson has doubted the right of Congress to create a department of agriculture under any circumstances, and it would seem that the doubts suggested by Judge Thompson are well founded. Agriculture is peculiarly a matter within the control of the several States, the same as manufacturing, mining and the other great industries of the country. Congress has no authority over them except as they begin to move from one State into another. Its authority ceases when they reach the other State and become mingled with the mass of property located therein. While in transit from one State to another, Congress has full authority to act, but beyond this it has no authority whatever.

Judge Thompson's closing paragraph is as follows:

> "But even under our liberal theory of interpretation, we doubt whether any warrant can be found in the instrument for the creation of the Department of Agriculture. This

subject could solely be dealt with, and is dealt with, by the respective States, for their own inhabitants and their own purposes. There is no reason, such as existed in the case of the Louisiana Lottery, and such as still exists in the case of the Sugar Trust, and the Railroad Trust, and of many other trusts, demanding the interference of the general government. To support such congressional action requires even a larger interpretation of the general welfare clause than we have been disposed to give it. But if such an interpretation could fairly be found in the instrument, we are in favor of finding it. The power to establish a Department of Commerce in the President's cabinet seems to have been clearly conferred upon Congress in the power to regulate commerce between the State and with foreign countries."

30 Am. Law Review, 790.

We do not think it necessary for this court to pass upon this point. It must, we are satisfied, dismiss the writ of error for the reasons given. In case we are mistaken on this point, then it will be found that the decision of the Court of Appeals is correct; and only after all these other questions are disposed of will it be necessary to inquire into the powers of Congress. If finally compelled to test them, however, it will be found not to extend to this particular regulation.

Respectfully submitted,

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No. 153.

Add'l Brf. of Thomas Bryant for D. C.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1898.

Filed Jan. 20, 1899.

No. 153.

J. K. MULLEN AND C. D. McPHEE, PLAINTIFFS IN ERROR,

vs.

THE WESTERN UNION BEEF COMPANY,
DEFENDANT IN ERROR.

ADDITIONAL BRIEF FOR DEFENDANT IN ERROR.

We simply desire to call attention to two or three additional cases.

On our motion to dismiss because the plaintiffs in error did not first go to the supreme court of Colorado, little need be said. The point is made that the supreme court of Colorado has decided that it will, under some circumstances, refuse to entertain jurisdiction, even though a constitutional question may be involved; that is, the court will inquire into the question of whether the constitutional question is

necessary to a decision. But who is to decide this point—this court or the supreme court of Colorado? We contend that the Colorado court must first pass upon it. The plaintiffs in error must exhaust all their remedies in Colorado before coming here.

On the ground that the Federal question involved must be decided against the complaining party, we desire to call attention to—

Laclede Gas Light Co. *vs.* Murphy, 170 U. S., 78.

This court there refused to review the decision of the supreme court of Missouri because whatever Federal question was involved had been decided in favor of the party coming to this court. We have shown in our former brief that this is what happened in the case at bar. The trial court actually decided every point raised on the act of Congress in favor of the plaintiffs.

On the merits of the controversy, as we term them, we desire to cite—

Rhodes *vs.* Iowa, 170 U. S., 412.

This case is a good illustration of the point we are contending for. The court squarely holds that the very moment property moving from one State into another has reached its destination and become mingled with the general mass of property in the new State it ceases to be under the control of Congress. The court divided on the question as to what moment of time the journey ended. Justices Gray, Harlan, and Brown thought that the moment the property was unloaded from the vehicle in which it was being conveyed it became a part of the property of the State. The other judges were of opinion that the property had first to

be delivered to the consignee and he had had an opportunity to dispose of it.

In the case at bar the decision of the majority is sufficient. The cattle in controversy had completed their journey beyond question, and yet it is contended they were still subject to regulation by Congress, and must be herded and cared for in accordance therewith.

We submit, the case must be dismissed and affirmed.

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